EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
JAN 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

* * * * *

Case Number 85-1061

NORMAN C. OWENS, Superintendent,
Indiana Reformatory,

Petitioner,

vs.

JACK RINER,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HOWARD B. EISENBERG

Southern Illinois University
School of Law
104 Lesar Law Building
Carbondale, Illinois 62901

(618) 536-4423

ATTORNEY FOR RESPONDENT.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, STATEMENT OF THE CASE	2
REASONS WRIT SHOULD BE DENIED	2-7
THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WHICH ARISES IN AN UNUSUAL FACTUAL SETTING, IN A CASE TRIED MORE THAN FIFTEEN YEARS AGO	2-7
A. There was Ample Basis for the Court of Appeals to Find "Cause" for not Raising the Confrontation Issue in the State Courts under the Unique Facts of this Case.	2-5
B. The Hearsay Statement was the Only Evidence Sufficient to Convict this Respondent of Any Offense.	5-7
CONCLUSION	8

TABLE OF AUTHORITY

Cases

Bruton v. United States, 391 U.S. 123 (1968)	1,2,4,5
Janigon v. State, 429 N.E.2d 959 (Ind. 1982)	6
Peterson v. United States, 405 F.2d 102 (8th Cir. 1969)	6
Riner v. State, 281 N.E.2d 815 (Ind. 1972)	3
Wainwright v. Sykes, 433 U.S. 72 (1977)	5

United States Code

28 U.S.C. sec. 2254	5

Other Authority

Torcia, Wharton's Criminal Law	7

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

* * * * *

Case Number 85-1061

NORMAN C. OWENS, Superintendent,
Indiana Reformatory,

Petitioner,

vs.

JACK RINER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Jack Riner, respectfully prays that the Petition for Writ of Certiorari, filed by the State of Indiana herein, be denied.

QUESTIONS PRESENTED FOR REVIEW

1. Was the representation by a single attorney of Respondent and a co-defendant in their joint trial for First Degree Murder in the State courts of Indiana and on direct appeal sufficient "cause" for allowing the Respondent to raise a confrontation issue under Bruton v. United States, 391 U.S. 123 (1968) in this federal habeas corpus petition when that attorney failed to object on "Bruton" grounds to a statement incriminating Respondent, allegedly made by the other jointly represented defendant, introduced in evidence at the joint trial and when the same attorney failed to raise such "Bruton" issue on appeal to the Indiana Supreme Court?

2. Was the introduction of the jail-house statement harmless error when it was the only evidence adduced at trial which suggested that Respondent had participated in the robbery?

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, STATEMENT OF THE CASE

Respondent accepts these portions of the Petition for Writ of Certiorari filed herein. Additional and supplemental facts will be stated in the body of the argument herein.

REASONS WRIT SHOULD BE DENIED

THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WHICH ARISES IN AN UNUSUAL FACTUAL SETTING, IN A CASE TRIED MORE THAN FIFTEEN YEARS AGO.

A. There was Ample Basis for the Court of Appeals to Find "Cause" for not Raising the Confrontation Issue in the State Courts under the Unique Facts of this Case.

The Respondent, who was fifteen years old at the time, is alleged to have assisted his uncle, Wayne Evans, in committing the burglary of a store in the early morning hours of August 10, 1970. During the burglary Edward Gibson, one of the owners of the store, was killed. Respondent's culpability for the murder is based upon the theory that he aided and abetted his uncle's commission of the burglary and was thus responsible for the consequences thereof, including the death of Gibson. Respondent's brother, Ronald Riner, was also initially charged with the crime.

Respondent and Evans were tried jointly, represented by the same attorney. At trial Ronald Riner testified that while he and Evans were confined in jail prior to trial, Evans told him that Respondent had assisted in the burglary. No objection based on Bruton v. United States, 391 U.S. 123 (1968) was made by the attorney representing both defendants, although an unspecified objection (see, p. 9 of Petition) as to Respondent was sustained by the trial court*. Neither Respondent nor Evans

---

* In Bruton this Court explicitly held that an objection based on hearsay was inadequate to protect the confrontation rights of a defendant, at 391 U.S. 128-129.

testified at trial and the jury was not admonished as to its use of the jail-house, hearsay statement.

The attorney representing both Respondent and Evans devoted virtually his entire closing argument for the defense by attacking the credibility of Ronald Riner (State Court Record, pp. 1094-1107). At no point did counsel for the two defendants point that that the statement was not even admissible as to Respondent; no jury instruction or admonition on this issue was requested or given. Indeed, throughout his closing argument counsel attempted to evoke the sympathy of the jury for both Respondent and Evans by constantly referring to Respondent's youth. Thus counsel clearly used Respondent's age to assist Evans, without ever differentiating the difference in evidence against his two clients. Had this conflict not existed and if Respondent was represented by separate counsel, and have the trial of the two defendants not been severed, independent counsel would certainly have hammered away at the lack of any evidence implicating Respondent sufficient to convict him as a party to the burglary or consequential murder. Counsel for Respondent had no need to attack Ronald Riner's credibility because Ronald's testimony of the hearsay statement was not admissible as to Respondent, and was so found by the trial court.

The same attorney was appointed to appeal both Evans' and Respondent's convictions to the Indiana Supreme Court. The cases were briefed and considered together, raising only the issue of Ronald Riner's credibility and competency, Riner v. State, 281 N.E.2d 815 (Ind. 1972). Again, no Bruton issue was raised and no effort was made to distinguish between the use of the statement as to the two defendants. Both convictions were affirmed. The charges against Ronald Riner were ultimately dismissed.

When the Respondent subsequently was represented by new counsel, the Indiana courts concluded that the Bruton issue had

been waived and could no longer be raised in State court.

It is in this unusual factual context that the Court of Appeals found that Respondent had demonstrated "cause" for not raising the confrontation issue either at trial or on direct appeal. Contrary to the suggestion made by Petitioner (Petition, p. 12) the Court below did not adopt a per se rule finding that "cause" existed merely because there was joint representation. Here the Court found that the single attorney representing both Respondent and Evans had an actual conflict which prevented him from making the proper objection or raising the issue on direct appeal. The jail-house statement by Ronald was actually helpful to counsel's representation of Evans, while highly prejudicial to Respondent. In the hearsay statement Evans asserted that he had fired the shots only after being shot at himself, thereby raising the suggestion of self defense. Unfortunately, since the Respondent is alleged to have aided and abetted the burglary and murder his culpability was established by other parts of this same statement, if the hearsay was believed by the jury.

Petitioner seeks to convert this essentially fact-bound case, tried more than fifteen years ago, into a vehicle to resolve issues which are not presented. It is highly unlikely that any court would allow an attorney, even a retained attorney, to represent two defendants in a joint trial in a capital case in which there is a statement which is a classic violation of Bruton.

The best Petitioner's can do is seize upon JUDGE FLAUM's use of the word "possibility" (Petition, p. 12) to suggest that the Court below misapplied the law. This is an unfair and exceedingly disingenuous reading of the panel's decision. The panel found that the attorney representing both defendants had a conflict which prevented him from raising the confrontation issue at trial and certainly from raising that issue on appeal.

The Court of Appeals' resolution of this issue was

entirely consistent with the law and common sense. The impropriety of a single attorney representing the two defendants in this type of case, both at trial and on appeal, is obvious. The legal question is pellucid--this hearsay statement violated Bruton. Counsel used the inadmissible statement to Evans' advantage, but to Respondent's detriment. By allowing the cases to be tried jointly counsel was able to use Respondent's youth to benefit Evans, while clearly prejudicing Respondent. The fact that Indiana does not provide an alternative vehicle for raising this issue collaterally, while unfortunate, leaves Respondent no other remedy but that provided in 28 U.S.C. sec. 2254. He amply demonstrated "cause" for the state procedural default as required by Wainwright v. Sykes, 433 U.S. 72 (1977) and its progeny.

B. The Hearsay Statement was the Only Evidence Sufficient to Convict this Respondent of Any Offense.

Petitioner argues, first that Respondent was not prejudiced by the admission of the hearsay statement given by Wayne Evans to Ronald Riner, and, secondly, that the admission of this evidence was harmless beyond a reasonable doubt. Both of these arguments relate to the assertion that there was sufficient evidence of Respondent's guilt without considering the jail-house, hearsay statement.

As an initial proposition, it is manifest that the testimony of Ronald Riner, as to a statement given him by Wayne Evans, introduced in a joint trial of Respondent and Evans, in which neither testified, is a classic violation of Bruton. The Petitioner makes no argument to the contrary.

Petitioner, relying on the opinion of the dissenting judge in the Court of Appeals, argues that absent the hearsay testimony of Ronald Riner, there was sufficient evidence to convict Respondent at trial. Respondent asserts this is simply incorrect.

Without the testimony of Ronald Riner of what Wayne Evans

allegedly told him in the jail there was no evidence upon which any trier of fact could conclude that the Respondent aided or abetted the offense. There is no evidence, other than this hearsay, which suggests that Respondent acted as a lookout, entered the store, stole anything, or in any way furthered the outcome of the offense. There is no evidence that Respondent knew of his uncle's plan, approved of it, or desired to assist in the criminal activity. At best the evidence emphasized by Petitioner at pages 18 and 19 of the Petition puts Respondent at the crime scene. Contrary to Petitioner's submission, there is no evidence, other than Ronald's hearsay testimony, that the Respondent participated in the offense. While there is testimony that two people ran from the area of the store, there is no evidence that two people committed the crime or that Evans was assisted in the crime by anyone. Harold Gibson did not testify that two people were in the store or that two people were involved in the burglary. His only statement referring to two people was that he saw two figures running from the area of the store. Ronald's hearsay declaration did not corroborate any evidence on this point; it was the only evidence supplying the essential element of Respondent's actual participation in the offense.

Without evidence of actual participation, mere presence at the scene of the crime is not sufficient under Indiana law to sustain a conviction, Janigon v. State, 429 N.E.2d 959, 960 (Ind. 1982). "In order to find that a person aided and abetted another in the commission of a crime, it is necessary that he associate himself with the unlawful venture, that he participate in it with desire of accomplishment, and that he seek by his action to make it succeed," Peterson v. United States, 405 F.2d 102, 109 (8th Cir. 1969). Even if the bystander knows and approves of the crime being committed, he does not become liable as an aider and abettor unless he makes known to the principal that he shares his purpose, actually undertakes an act of

assistance, or makes known to the principal that he will assist if necessary, 1 Torcia, Wharton's Criminal Law, §31, p. 166.

In this case the testimony of the surviving victim does not establish that two persons committed the offense, only that two people were running from near the scene. Under the facts here, it is just as likely that the second person was Ronald Riner and not the Respondent. Moreover, other than the Ronald Riner hearsay of the jail conversation with Evans, this record is absolutely and totally devoid of any evidence whatsoever that this Respondent undertook any action to assist in the commission of the offense, that Respondent shared Evans' criminal intent, or that he, in any way, made known that he would assist in the commission of the crime. Viewing this record most favorably to the prosecution and giving Petitioner every reasonable doubt in this record, the fact remains that the redacted evidence, absent the objectionable statement, at best puts Jack at the crime scene. There is no other evidence of Jack's actual involvement in the commission of the offense. No reasonable jury could have properly convicted this Respondent of murder, absent this hearsay, even if there was evidence that this Respondent went with his uncle, while his uncle was carrying a weapon, a fact Respondent contests. Absent untainted evidence of Respondent's involvement in the offense, which simply does not exist, this conviction could not be sustained, even if Respondent ran from the crime scene after the shots were fired.

CONCLUSION

The Court of Appeals carefully considered each of the arguments now advanced by Petitioner, both initially and on rehearing. The Court considered the unusual facts of this case and correctly followed the law. This case raises no broad question of law to warrant this Court's review nor was the Court of Appeals incorrect in its resolution of the issues raised. There is no reason for the Court to exercise its discretion to review this case.

For the reasons argued herein, Respondent respectfully prays that the Petition for a Writ of Certiorari to the United States court of Appeals from the Seventh Circuit be denied.

Respectfully submitted,

HOWARD B. EISENBERG

Southern Illinois University
School of Law
104 Lesar Law Building
Carbondale, Illinois 62901

(618) 536-4423

ATTORNEY FOR RESPONDENT.